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IN THE

Supreme Court of the United States

October Term, 1963

No. 820

ALFRED G. SICA,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Alfred G. Sica, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment affirming judgments of the United States District Court for the Southern District of California, sentencing petitioner to three years imprisonment.[1]

Opinions Below.

Trial in the District Court was by a jury.

The opinion of the court below, is appended hereto as Appendix "A", and is also found in the Clerk's Record of the Circuit Court. The opinion of the Court

[1]The record as certified to this Court by the Clerk of the Court below consists of the proceedings in the Circuit Court, Volume 1, one volume consisting of the Reporter's Transcript of the proceedings in the District Court, including the testimony taken at the trial. The Reporter's Transcript will be referred to as [R. T.]; and the Clerk's Record in the Court of Appeals will be referred to as [R. C. A.].

below is as yet not reported. The judgment of the court below is appended hereto as Appendix "B". A copy thereof also appears in the Clerk's Transcript from the Circuit Court.

A Motion for Rehearing was made and also to the effect that the Court remand the case to the United States District Court for the Southern District of California for the purpose of taking evidence with reference to the subject of whether or not there was any limitation placed upon the receipt in evidence of Exhibits 10 to 13 inclusive, and whether or not counsel for the defendant were in any way notified by the Court that any of the said exhibits were admitted for limited purposes. The Motion requested a proceeding in accordance with *Brown v. United States*, 9th Circuit, 314 F. 2d 393 (1963). The Motion was supported by an affidavit, and the motion with the supporting affidavit are appended hereto as Appendix "C". They are also to be found in the Transcript of the Record by the Circuit Court.

The order denying the Petition for Rehearing and Motion are attached hereto as Appendix "D". It is also to be found in the Clerk's Transcript of the Circuit Court filed herein.

District Judge Foley, Sr., who dissented in the original opinion, voted in favor of granting the Pe ition for Rehearing and the Motion. This is incorporated in the Order Denying the Petition for Rehearing and Motion.

Grounds on Which the Jurisdiction of This Court Is Invoked.

I.

The date of the judgment sought to be reviewed and the time of its entry is November 18, 1963 [R. C. A. Judgment].

The Petition for Rehearing timely filed was by the Court denied January 13, 1964, as was the Motion to Remand denied on the same day [R. C. A.]. The Order Denying Petition for Rehearing and the Motion are attached as Appendix "D". Judge Foley voted in favor of granting the Petition for Rehearing and Motion.

The statutory provision believed to confer on this court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U. S. C. 1255(1).

The Petition for Rehearing is attached hereto as Appendix "E".

Questions Presented for Review.

1. The lower court erred in approving the receipt in evidence in the trial court over objection of a letter and financial statement from the witness Vaughn to Seedman, a witness, and checks which were paid to him concerning a business trip to Los Angeles and the expenses incident thereto. It was hearsay and never connected to Sica.

1(a). Subsidiary to this question is the question as to whether petitioner's counsel at the trial, after making the objection of "hearsay", were under a duty of asking the trial court to instruct "that the evidence was received for a limited purpose only.".

1(b). Also, subsidiary to this question of "hearsay" is the question of whether the trial counsel, by reason of unreported argument and conferences about the matter, were informed by the court that Exhibit 10, the Vaughn-to-Seedman letter was to be admitted, not for the truth of the statement or statements but, only to establish Vaughn's statements were made.

1(c). Also, subsidiary to the "hearsay" question is the proposition as to whether the court below erred in denying our motion to remand to determine whether or not the defendant, or his counsel, were advised that such hearsay evidence was received for a limited purpose only, thus placing upon counsel for the defendant the duty to request an instruction. We contended, by motion, we were never so advised, and moved to remand to take evidence on that question [See Motion and supporting affidavit R. C. A.], and Appendix "C". Also see Appendix "D", order denying motion. Judge Foley voted in favor of granting the motion.

2. Was the evidence sufficient to sustain the verdict as to Count II, the making of a false statement, in violation of 18 U. S. C. 1001.

Constitutional Provisions and Statutes Involved.

Involved are the Fourteenth Amendment to the Constitution and 18 U. S. C. 1001. They are set forth in Appendix "F".

Statement of the Case.

The trial court had jurisdiction under 18 U. S. C. 3231.

By an Indictment filed in the Southern District of California, the petitioner was charged in Count I with a violation of 26 U. S. C. 7201, in that on or about the

15th day of February, 1958, in the County of Los Angeles, within the Central Division of the Southern District of California, he willfully and knowingly attempted to evade and defeat a large part of the income tax, namely, that he had stated his adjusted gross income was $2,550.10, and that the amount of income tax due and owing by him was $341.00, whereas, he had an adjusted income of $7,550.10, upon which he owed the Government $1,418.53. On Count II he was charged with a violation of 18 U. S. C. 1001, in that on or about the 13th day of November, 1958, in the County of Los Angeles, within the Central Division of the Southern District of California, that he, Sica, did willfully and knowingly conceal and cover up a material fact and make a false, fictitious and fraudulent statement and representation in a matter within the jurisdiction of the Internal Revenue Service of the Treasury Department, a department and agency of the United States, in that he stated to the said department and agency that:[2]

---

[2]"Since Mr. Michael Cohen was released from prison on October 9, 1955, I have been a personal friend of Mr. Cohen and associated with him in a purely social manner.

"Since January 1, 1955, I have not received any moneys from Mr. Cohen; nor have I paid any moneys to Mr. Cohen. During the period January 1, 1955, to date, I have not received any moneys from anyone acting on Mr. Cohen's behalf; nor, have I paid any moneys to anyone on Mr. Cohen's behalf.

"During the period January 1, 1955, to date, I have had no business connection or negotiations with Mr. Cohen, directly or indirectly.

"During the period January 1, 1955, to date, I have made no substantial gifts to Mr. Cohen; nor has Mr. Cohen made any gifts to me, other than a wrist watch as a birthday gift in September, 1957.

"During the period January 1, 1955, to date, I have made no loans to Mr. Cohen; nor did he make loans to me.

"During the period January 1, 1955, to date, I have participated in no financial transactions to which Mr. Cohen also was a party."

The defendant-petitioner was tried before the Court with a jury on the said two-count indictment; he was by the jury found not guilty on Count I, the offense of evasion of income tax, in violation of 26 U. S. C. 7201, but was found guilty on Count II of the Indictment, the offense of making a false statement, 18 U. S. C. 1001. He was committed to the custody of the Attorney General for three years and sentenced to pay a fine to the United States of $2,000.00 (this record is found at Item 44 of the Transcript of Record filed by the Clerk of the District Court with the Circuit Court).

Facts Pertinent to the Determination of the Appeal and Petition.

A witness Breen testified he had had a conversation with Mr. Sica in which Mr. Sica represented he might be able to obtain some locations for coffee vending machines [R. T. 11, 12].[3] This business never materialized. Mr. Sica sometime later talked with him about getting locations for cigarette machines, said he thought that he could locate some, and that his services would be worth $25,000.00 to the Coast Cigarette Venders [R. T. 15]. There was some discussion between him and Sica about a competitive situation between Coast and Rowe's, both cigarette vending machine companies [R. T. 18, 19]. The competition was keen, they were paying higher bonuses for locations [R. T. 19, 20]. They made advances to owners or operators of locations where machines were put in; a bonus was paid for the privilege of installing the machines [R. T. 20, 21].

[3]The record in the trial court of the testimony is referred to as Reporter's Transcript [R. T.].

Coast Distributors brought in people from outside to assist during the competitive situation; Rowe brought people in from outside of Los Angeles. During the discussion, Mr. Sica said he thought he could be of some value to the company; there was a discussion about the competition [R. T. 21].

Meyer Carr testified that he was manager and president of Coast Vending; that Breen worked for him; they had discussed Mr. Sica, whom he had never met. They were engaged in intensive competition; their particular competitor was the Rowe Service Company; that he had several men from the parent company out of Southern California who had been brought in to help [R. T. 27, 28]. He met with Mr. George Seedman, the head of his competitor [R. T. 28; 29].

Harry Rudolph was called; he was known in the sports area, was a promoter of sporting events; he knew Mr. Sica; he knew Michael Cohen; he knew Lou Angelo; he had met Thomas Vaughn; Angelo and Vaughn visited him in Los Angeles; he was present when Mr. Angelo, Mr. Sica, and Cohen were at his apartment; he arranged a meeting at the request of Mr. Vaughn [R. T. 33, 34]. Mr. Sica came with Mr. Cohen; the meeting was in his apartment; he did not know, if anything, was discussed in Sica's presence. Vaughn, Angelo and Cohen went into the kitchen; he did not recall whether Sica went in there or stayed with him; they were watching television [R. T. 35]. He knew Mr. Vaughn was in the cigarette vending machine business; that Mr. Sica was in the vending business of some air conditioner or dryer that was used in rest rooms in the vicinity of Los Angeles [R. T. 38]. Later he met Mr. Vaughn, Mr. Cohen and Mr. Angelo at dinner; he had

no recollection of seeing Mr. Sica [R. T. 40, 41]. He knew there was some trouble in the cigarette field among venders; he did not know what the subject was discussed at his apartment; the men went into the kitchen and closed the door [R. T. 41, 42].

Louis Angelo testified he knew Mr. Vaughn, and Mr. Vaughn had been his employer [R. T. 44, 45]; the company he was employed by was associated with Rowe; George Seedman was in charge of the Rowe Company in California. He came to Los Angeles, stayed with his wife at the Ambassador Hotel; he met Mr. Rudolph at his apartment; there was McCoy, Vaughn, himself, some fight managers; neither Sica nor Cohen were present [R. T. 47, 48]. A few days later, Mr. Cohen and Mr. Sica came to McCoy's apartment; there he was introduced to Mr. Sica. Said Vaughn had told him there was trouble between Coast Service, a competitor, who was trying to get Mickey Cohen to help out against them. He could not remember anything else in the conversation; there were social things; there was no money mentioned or the subject of employing anyone [R. T. 53, 54]. His conversation with Sica was purely social; it wasn't business [R. T. 54, 55]. He did not know of Vaughn paying any money to either Cohen or Sica [R. T. 56]. No money changed hands during the meeting; he did not see anybody receive any money, and he received none; he paid none. That night some of them had dinner together, including Vaughn, Cohen, Fred Sica, and several other people [R. T. 56, 57]. Prior to coming to Los Angeles, he had some experience in dealing with competitive situations in the vending machine business [R. T. 63]. He obtained some locations while in Los Angeles, in November, 1957; he

thought the situation competitively was eased after his visit to Los Angeles; he saw Mr. Sica about five times [R. T. 64, 65].

Michael Cohen testified he had lived in Los Angeles many years; he had known Mr. Sica many years; he was at a meeting in Mr. McCoy's apartment at which Mr. Fred Sica, Mr. Vaughn, and Mr. Lou Angelo were present [R. T. 66, 67]. He was invited to the meeting by McCoy. There were other persons at the McCoy meeting, including himself and Mr. Sica. When he left the gathering, he and Mr. Sica left together; there were many things discussed; there was no talk of money or exchange of money. He did not recall Mr. Sica at any time at the meeting discussing the cigarette vending machine business [R. T. 70]. He saw Mr. Vaughn later; he was present at lunch at the Brown Derby when Mr. Vaughn was present, Mr. George Seedman was there, and Mr. Fred Sica [R. T. 72, 73]. No money was discussed. Mr. Vaughn laid some papers down on the table; he thought there was an envelope in these papers; Vaughn took them from one of his pockets [R. T. 73]. He did not see an envelope with money in it. He stated he had had financial transactions with Vaughn; he identified Exhibits 6 and 7 as photostats of checks; his endorsement appeared on them. He stated that he received checks in the amount of $3,000.00 from Vaughn; they were brought to him by Mr. Edward Gritz. [R. T. 74-77]. Gritz picked these checks up for him; they had nothing to do with the cigarette vending machine operation in Los Angeles. Fred Sica had nothing to do with this; neither did he know that Cohen was borrowing money from Vaughn [R. T. 77, 78]. He repaid a part of the money. He de-

nied ever having any financial transactions with Fred Sica since January, 1955, to November 13, 1958 [R. T. 80, 81]. There were no gifts between he and Mr. Sica; there were no loans between him and Mr. Sica. There was some travel between him and Mr. Sica; Sica went home to see his elderly mother once, and they went to visit a television show; Sica was mostly with his elderly mother [R. T. 82, 83]. Sica's mother lived in New Jersey; he had been there once with Sica to see her [R. T. 83]. Said he met George Seedman once at the Brown Derby, in Beverly Hills; he did not know what business there was; he knew there was some difficulty in the cigarette vending business; he had no interest in it; he paid no attention to it [R. T. 86]. He was never an arbitrator between two competing cigarette vending machine companies, and had no knowledge that Mr. Sica ever had been. He denied that from January, 1955, to November 13, 1958, he ever received any money from Mr. Sica. He denied ever paying any money to Mr. Sica from January, 1955, to November, 1958. He denied ever having any business or money transactions with Mr. Sica; he had never made any substantial gifts to Mr. Sica; Mr. Sica had never given him any substantial gifts. He denied ever loaning any money to Mr. Sica; denied Mr. Sica ever loaned him any money. He had never had any financial transactions with Mr. Sica from January 1, 1955, to November 13, 1958. Mr. Sica had been a social friend for many years [R. T. 94]; he had never had any business dealings with him whatsoever.

Edward I. Gritz testified he was an attorney; had lived in Los Angeles for five years; practiced law there; he knew Fred Sica; knew Michael Cohen; he had met Mr. Vaughn; these meetings were at night clubs. In December, 1957, he went to the Beverly Hills Hotel, at the request of Mr. Cohen; he picked up the original of two checks, Exhibits 6 and 7 [R. T. 109-112]; these were filled out by Mr. Vaughn in his presence; they totaled $3,000.00. There was no conversation between Mr. Vaughn and Mr. Sica of a business nature [R. T. 112, 113]. He merely picked up the checks for Mr. Cohen; Mr. Sica was not present; he delivered the checks to Mr. Cohen; Mr. Sica was not there [R. T. 113].

George Seedman testified that on November 27, 1957, he (manager of Rowe in Los Angeles) met Cohen and petitioner Sica at the Brown Derby in Beverly Hills. Before going to the restaurant, Seedman had obtained from his company a $5,000.00 check, made payable to himself, which he cashed for $5,000.00 in currency in one hundred dollar denominations, placing the currency in a white, business-size envelope that he handed to Vaughn at the Ambassador Hotel. At noon, Seedman drove on to the Brown Derby. Petitioner was alone waiting for them at the table; Cohen joined the group last [R. T. 124-128]. Seedman stated that Mr. Vaughn took an envelope, handed it to Mr. Cohen, and Mr. Cohen said, "That should be Fred's." He stated he was not sure just how it happened, but he could not re-

member whether Sica took the envelope or not, but the envelope was there; it was either in Cohen's hands or it was somewhere, it was very fast, it may have been given to Mr. Sica [R. T. 428]. He said the table was a small booth, with a round table. Vaughn was sitting close to Cohen. Vaughn handed the envelope to Cohen; he thought Mr. Cohen said, "This should go to Fred." Said he could not exactly remember where the envelope was. Mr. Vaughn had gotten rid of it; he was not sure where it went, his memory did not serve him as to that [R. T. 129, 149-151]. He was handed an affidavit to refresh his recollection. He stated after having his memory refreshed, it appeared the envelope was passed to Mr. Sica [R. T. 130, 131].

The witness Seedman identified Government's Exhibits 10, 11, 12 and 13 [R. T. 136]. He identified Exhibit 11 as a check with his signature thereon in the sum of $3,358.50, payable to Thomas A. Vaughn; Exhibit 12, another company check, was payable to him for $3,000.00, dated December 24, 1957; Exhibit 13, a personal check, dated December 24, 1957, for $3,000.00, payable to Thomas A. Vaughn; Exhibit 10, a two-page document from Thomas A. Vaughn [R. T. 138]; the date on the first page of the exhibit was December 19, 1957. After receiving Exhibit 10, he made out the checks, 11, 12 and 13. Exhibits 12 and 13 were checks, one a company check to himself, and the other his check for the same amount to Vaughn [R. T. 140]. Exhibit 11 was a company check to Vaughn; Exhib-

its 11 and 13 were connected with Exhibit 10. Vaughn sent him a bill for the amount of $3,558.53 [R. T. 142, 143]. Exhibit 10 was read to the jury [R. T. 145, 416, 417]. It was then stipulated that Mr. Crabtree, connected with the Internal Revenue Service, was conducting an investigation in the Mickey Cohen's tax liability and financial status. Crabtree talked with Mr. Sica, the petitioner, stated that he wanted an affidavit. Sica spoke some to him, and Crabtree took notes. It was reduced to an affidavit; the affidavit was prepared by the Intelligence Division of the Internal Revenue and given to Mr. Sica. There was the addition concerning some travel and a gift watch. The affidavit was finally submitted to Mr. Sica; Mr. Sica signed it in their presence, and stated his attorneys had okayed his signing the affidavit [R. T. 154-160].

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING THE SAME.

I.

Certiorari Should Be Granted to Settle the Important Question Arising in This Case. The Lower Court Erred in Approving the Receipt in Evidence in the Trial Over Objection That It Was Hearsay of a Letter and Financial Statement From the Witness Vaughn to Seedman and Checks Which Were Paid to Him Concerning a Business Trip to Los Angeles and the Expenses Incident Thereto. It was Hearsay and Never Connected, We Contend, to Sica.

The Court received, over objection, Exhibit 10, a two-page document in the form of a letter from Vaughn to Seedman heretofore described, and Exhibits 11, 12 and 13, checks. Exhibit 10 was a request for payment of expenses by Vaughn forwarded to Seedman. Thereafter, checks involving the transaction, and payment by Seedman to Vaughn, were made. The evidence is reported at pages 138 and 139 of the Reporter's Transcript. Objections were made, beginning at pages 138, 139, the final one being:

> "Mr. Brumbaugh: If Your Honor please, I object to this. The latter to Mr. Vaughn, what he did outside the presence would be hearsay of the rankest type.
>
> "The Court: Objection overruled."

Again, objection was made at pages 141, 143, 144; again at pages 166 to 168 of the Reporter's Transcript, at the time of motion for judgment of acquittal.

It is our contention that the evidence referred to in some detail in our Statement of the Evidence, and

just above, including the letter which was in effect a statement of Vaughn's expenses concerning his trip to Los Angeles, and the checks received in evidence, and the testimony of Mr. Seedman concerning them, should not have been admitted against the defendant Sica. It permitted the jury to infer that there was a business deal involving Sica to which Cohen had knowledge or a part, and in effect this was imputed to Sica. The evidence does not warrant such a conclusion, but undoubtedly that is why it was offered. It was hearsay without any connection with Sica whatsoever. This was nothing more than a personal letter from Vaughn to Seedman and an intro-company accounting and a reimbursement of expenses paid by Vaughn. It in no manner involved any dealings with Sica, for in truth and in fact Sica had no dealings with these expenses, and the evidence concerning the same, the payment of the checks and the checks themselves were not properly received, but would and did go to the jury having been received in evidence and they, of course, considered them.

We respectfully direct the court's attention to the case of *Matthews v. United States*, 217 F. 2d 409, a Circuit Court case which we think is in point and condemns the use of hearsay evidence. At page 411 the Court said:

> "The government's proof in this case was weak and entirely circumstantial, and while there was more here than mere presence and flight, as in the case of *Hicks v. United States*, 210 Fed. 2d 228, decided by this Court October 29, 1954, in view of the opportunity more fully to develop the case which a new trial will furnish, we find it unnecessary to decide whether it was or was not insufficient. The trouble is that some of the evidence ought not to

have gone to the jury; and the fact that it did must be held to be prejudicial error. While it is not necessary for us to speculate as to what effect the illegal evidence had on the deliberations of the jury, it is nevertheless appropriate to point out that a case in which the government has barely proved enough to sustain a verdict offers a good backdrop against which to examine the importance of adhering to rules of evidence which might otherwise annoy those who are impatient with the law's technicalities.

". . . (A)ny deduction by the jury drawn from the fact that Matthews had purchased an unspecified number of drums and an automobile radiator and a shovel and a hoe would of necessity be based on pure speculation; . . . ".

We direct the court's attention to the dissenting opinion of Foley, Senior District Judge in this case, in which he discusses the receipt in evidence of the exhibits, and he discusses the majority opinion which, in effect, attempted to shift the burden to counsel for the appellant, wherein the majority opinion said:

"It would have been proper for Sica's counsel to ask the court to instruct the jury as to the purpose for which these documents were deemed admissible, and to caution them that Exhibit 10 was not evidence of the truth of the statements that it contained. The Court, however, was not obliged to give such an instruction, unless asked to do so. The law wisely places upon counsel the duty to request it." [See Opinion, R. C. A. and attached hereto, p. 10].

This is fully discussed by Senior District Judge Foley dissenting, and we adopt the argument advanced by him

in the dissenting opinion, in the interest of brevity. It was not our duty to ask the court to limit this evidence or the purpose for which it was received. We would have been doing a disservice to our client in asking that the court instruct on evidence which had been received over our objection that it was hearsay to the effect that it was received for a limited purpose only. There is nothing in the record to show that it was received for a limited purpose only.

Next, in connection with this and subsidiary to the principal question is the question of whether the trial lawyer by reason of unreported argument and conferences about the matter, were informed by the court that Exhibit 10, the Vaughn-to-Seedman letter, was to be admitted, not for the truth of the statement or statements, but only to establish Vaughn's statements were made.

Also, related and subsidiary to the principal question is the proposition as to whether the court below erred in denying our motion to remand to determine whether or not the defendant or his trial counsel were advised that such hearsay evidence was received for a limited purpose only. We contend by a motion before the lower court that we were never so advised, and moved to remand to take evidence on that question [See Motion and Supporting Affidavit, R. C. A. and Appendix "C". Also see Appendix "D," the Order Denying Motion, in which Judge Foley voted in favor of granting the motion as well as a rehearing]. We respectfully contend the lower court was in error in not remanding the case to take testimony upon this subject concerning the unreported conversations, in order that the record might be absolutely clear that this evidence was not, as we now con-

tend and did then, that it was not received for a limited purpose, but that it was hearsay, and went to the jury over our objections. The learned dissenting opinion cites *Brown v. United States*, 9 Cir. 314 F. 2d 293 (1963), reciting:

> "In that case the record did not on its face show error. There the court remanded for a hearing by the trial court to determine whether or not in the unreported argument of counsel error was committed."

We adopted the reasoning in the *Brown* case, *supra*, and moved the court, supported by an affidavit by one of counsel, to remand the case. This the Circuit Court refused to do. We contend that that was error. As a minimum, the matter should have been referred to the trial court to clear up this issue.

We refer now to what the majority said with reference to the question as to the admissibility of the documents and resulting prejudice, as cited in the dissenting opinion [R. C. A. 10], the majority contends that:

> "Even if we are in error as to the admissibility of the documents and as to the duty of counsel to request a limiting instruction, we can find no prejudice."

The question of whether there was prejudice cannot be so lightly disposed of. In *Kotteakos v. United States*, 328 U. S. 750, 761, Mr. Justice Rutledge, speaking for the Supreme Court, had the following to say:

> "The hearsay rule is often grossly artificial. Again in a different context it may be the very essence of justice, keeping out gossip, rumor, unfounded report, second, third or further hand stories." (Pages 13, 14, Dissenting Opinion.)

This subject is discussed at greater length in the dissenting opinion and we must, in the interest of brevity, respectfully ask the court to refer thereto.

As stated by the trial judge during the course of the trial [R. T. 167], "this is a very close case." As cited by the learned judge in the dissenting opinion, "As stated by the trial judge during the course of the trial [R. T. 167]; this is a very close case, and it cannot be assumed that the statements contained in any of the exhibits, 10 to 13 inclusive, did not have substantial influence upon the jury in arriving at a verdict of guilty. The jury was not informed during the course of the trial, or by means of an instruction, that any of the exhibits 10 to 13 inclusive were admitted for limited purposes. It is therefore impossible for this court to say to what extent any of these exhibits influenced the jury in returning its verdict of guilty, and we have no way of knowing to what exent, if at all, the jury's belief or disbelief in the truth of any of the statements contained in any of said exhibits influenced its verdict."

[See R. C. A. p. 12, dissenting opinion; also attached hereto]

Quoting again from the dissenting opinion [R. C. A. 14]:

> "As pointed out by Mr. Justice Rutledge in *Kotteakos v. United States*, 328 U.S. 764: 'If when all is said and done the conviction is sure that the error did not influence the jury or had but very slight effect, the verdict and the judgment should stand; except perhaps with the departures from a constitutional norm, or a specified command of Congress.' Bruno v. United States, 308 U.S. 294.

"But if one cannot say with fair assurance after pondering all that happened without stripping the erroneous action from the whole that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result apart from the phase affected by the error. It is rather even so whether the error itself had substantial influence if so, or if one is left in grave doubt the conviction cannot stand."

II.

The Evidence Was Not Sufficient to Sustain the Verdict as to Count II, the Making of a False Statement in Violation of 18 U. S. C. 1001.

At the outset, we recognized that this is a difficult question for any reviewing court. However, in line with the ruling in *McNabb v. United States*, 318 U. S. 332, 341, where the Court said:

"For while the power of this court to undo convictions in state courts is limited to the enforcement of those fundamental principles of liberty and justice Hebert v. Louisiana, 272 U. S. 312, 316, which are secured by the Fourteenth Amendment, the scope of our reviewing power over convictions brought here from the Federal Courts is not confined to ascertainment of constitutional validity. Judicial supervision of the administration of criminal justice in the Federal Courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial

by reason, which are summarized as due process of law, and below which we reach what is really trial by force. . . .

"The principles governing the admissibility of evidence in Federal criminal trials have not been restricted therefore to those derived solely from the constitution. In the exercise of its supervisory authority over the administration of criminal justice in the Federal Courts. See Nardone v. United States, 308 U. S. 338, 341. This Court has from the very beginning of its history formulated rules of evidence to be applied in Federal criminal prosecutions." (Citing cases).

It is our contention that the evidence in this case was not sufficient and it was aggravated by the admission in evidence of hearsay evidence concerning which Sica had no knowledge. As a sample of this was the testimony of Gritz, the witness who at the request of Cohen went to Vaughn, picked up some checks and brought to Cohen, concerning which there was no evidence that Sica had ever heard of this transaction, and Cohen himself testified that this was a loan, partially repaid by him to Vaughn [See R. T. concerning Exs. 6 and 7 (R. T. 74-78)]. It was strictly a loan from Vaughn to Cohen [R. T. 77-81]. This transaction was objected to [R. T. 77-81]. The substance of the testimony there was to the effect that Mr. Gritz had brought two checks from Vaughn to Mr. Cohen. Mr. Cohen testified he was borrowing this money from Tom Vaughn. Most of it he said had been repaid. Mr. Cohen testified, referring to the United States Attorney prosecuting the case, "Most of it has been repaid. I do not know exactly. I think you have the

checks in repayment of the loan [Referring to Assistant U. S. Attorney]. You have the check that is marked 'x' repayment of this loan. Q. We will get to the other end of it. You are the witness. I am not. So let me proceed this way: Direct your attention to the following year. We are in 1957, going into 1958. Did you have occasion in 1958 to receive any checks from Mr. Vaughn?" [R. T. 78]. Mr. Cohen then testified he received checks from Vaughn, "I borrowed, I think it was $3,000.00 from Tom Vaughn. Tom Vaughn's checks were marked as loans, and I think they would bear it out." [R. T. 78-79].

Further objection was made to this testimony on page 79. It is our contention there was no substantial evidence to show:

(a) That Sica had received any moneys from Mr. Cohen;

(b) That he had paid any moneys to Mr. Cohen;

(c) That he had received any money from anyone acting on Mr. Cohen's behalf;

(e) That he had had any business connections or negotiations with Mr. Cohen;

(f) That he had made any loans to Mr. Cohen; or

(g) That Mr. Cohen had made any loans to him.

It is our contention, and was, that the government failed to both allege and prove the materiality of the transaction.

It is further our contention that the section under which Sica was prosecuted was not intended to reach a case of this kind. We contend that that was enacted

by Congress for the purpose of prosecuting those who made false statements, for instance, if one sought to get a passport falsified, material statements therein, or sought a contract from the government and made false statements in support of the application, or made applications for loans and made false statements in support of the application. Otherwise the perjury statutes would apply to ones who made false statements. There appears to be an overlapping, and we contend that the court should grant certiorari in this case in order to clarify this situation and prevent any duplication or overlapping of the statutes.

Construction of §1001.

Going to the original Supreme Court discussion of §1001, formerly §80, we find the language of the Court in *United States v. Gilliland*, 312 U. S. 86, 93, 61 S. Ct. 518, 522 (1940), wherein the Court said, in discussing the use and purpose of the 1934 Amendment:

> "The amendment indicated the congressional intent to protect authorized functions of governmental departments and agencies from perversion which might result from the deceptive practices described."

In so stating it appears that the Court interpreted the meaning of the statute as protecting the government from false statements of persons to further their own purposes. In the present case, the only statements made were ones relating to another. None of the cases cited in the annotations or other cases involve a situation such as we have in the present case.

Other courts, discussing the same statute in the light of subsequent interpretations by the government and

themselves have made the following findings and interpretations:

Brandow v. United States, 9th C.C.A., 268 F. 2d 559, 565 (1959), quoting from *United States v. Quirk*:

"We believe that the conduct congress intended to prevent by §1001 was the willful submission to federal agencies of false statements calculated to induce agency reliance or action . . ."

United States v. Stark, 131 Fed. Supp. 190, 205 (1955), stating the purpose of § 1001 and tracing its history:

". . . . (T)he problem here is not to be determined by the mere physical form of the statement but rather by its intrinsic nature and purpose.

"The sweeping generality of the language of §1001, especially when isolated as it appears in the 1948 revision from the remainder of the 1934 amendment, required caution in applying it to a particular situation."

And, in *United States v. Davey*, 155 Fed. Supp. 175, 178, the Court said:

"Under the familiar canons of construction a penal act of the harshness and rigor of this one,—a harshness and rigor so great that, as the revisor points out in the notes to the code as amended in 1948, the punishment was reduced from ten to five years—the staute will not be stretched beyond, and will be strictly confined within the fair meaning of its terms."

(Citing *United States v. Moore*, 185 F. 2d 92, 95.)

In speaking of the falsification, there is a split of authority as to the material nature thereof. If as found, as we have assumed for the purposes of argument, that the statement made by Mr. Sica was false, such statement was not materially false. The view adopted by the Ninth Circuit Court of Appeals is found in the Opinion of the District Court in *United States v. Allen*, 193 Fed. Supp. 954, at page 956 (1961), where the Court states:

> ". . . (T)he better view, and that adopted by the 9th Circuit is that 18 USCA §1001 has been violated only if the defendant has made a *material* falsity." (Emphasis ours.)

The Court further states, at page 957:

> "The conduct congress intended to prevent by §1001 is the willful submission to federal agencies of false statements."

Mr. Sica was requested by the Internal Revenue Service to make a statement; he did so not willfully concealing anything pertinent to their investigation. The Government has failed to prove the allegations in the second count of the indictment.

The evidence adduced by the Government, as previously discussed, and especially contained in the testimony of Michael Cohen, fails to establish any violation.

The more accepted view, and that followed in the 9th Circuit, requires that the Government allege and prove the materiality of the alleged false statement made by a defendant when he is prosecuted under this section of the code. For support of this proposition see *Roland v. United States*, 200 F. 2d 678 (1953), 5th C.C.A., cert. denied 1953, 345 U. S. 904, 73 S. Ct. 950.

On the matter of the requirement of the material falsity of the statement made, see *Freidus v. United States*, 223 F. 2d 598 (1955), 96 U.S. App. D. C. 133, wherein the Court said, *inter alia*:

> "The test of guilt is whether evidence is such that a reasonable mind might fairly conclude guilt beyond a reasonable doubt."

At pages 601, 602, the Court discusses the burden of the Government in such a case, stating:

> "The government must . . . prove that the specified entries were objectively false, and were made, willfully and with knowledge of falsity, in a material matter within the jurisdiction of a department or agency of the United States . . . proof of materiality is essential under §1001."

A fair discussion of the statute involved in this case and its application is found in the case of *United States v. Stark*, 131 Fed. Supp. 190, 205.

In this case, petitioner Sica was sought out by Government Agents; he did not seek them out; they talked with him; they had discussions; they prepared the statement themselves, even made some corrections. No effort apparently was made by Sica in any respect to deliberately falsify any statement or to deceive the Government. The evidence, we respectfully urge again, was insufficient.

In our research it appears to us that many immigration cases come before the reviewing courts and quite often they are reversed. For instance, a fair summary is to be found in *Calvillo v. Robinson*, 271 F. 2d 249 (Nov., 1959, 7th Cir.) where an alien in his application to the United States Consul for a visa stated he

had resided in the United States two months during the period from 1950 to 1951, but he had failed to disclose the fact that he had previously resided in the United States about six months in 1943 and again in 1948 ~~and~~ 1953. It was held by the reviewing court that he was not guilty of a "willful misrepresentation of a material fact" which would justify his deportation.

Conclusion.

The Petition for Writ of Certiorari, we respectfully pray, should be granted and the judgment reversed. As a minimum, the matter should be referred to the lower court for a hearing to take evidence on the question of whether or not at the unreported meetings or sessions there was any advice given by the Court to the attorneys for the defense that the hearsay evidence was received for a limited purpose.

Respectfully submitted,

RUSSELL E. PARSONS,
Attorney for Petitioner,
Alfred G. Sica.

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APPENDIX "A"

Opinion of the Court Below.

United States Court of Appeals for the Ninth Circuit

Alfred G. Sica, Appellant, vs. United States of America, Appellee. No. 18,011.

Nov. 18, 1963.

Appeal from the United States District Court for the Southern District of California Central Division.

Before: Jertberg and Duniway, Circuit Judges, and Foley, Sr., District Judge.

Duniway, Circuit Judge:

Sica was adjudged guilty upon the verdict of a jury of a violation of 18 U.S.C. §1001 and he appeals.[1] The charge was that:

> "On or about the 13th day of November, 1958, . . . [he] did wilfully and knowingly falsify, conceal, and cover up a material fact and make a false, fictitious, and fraudulent statement and representation in a matter within the jurisdiction of the Internal Revenue Service of the Treasury Department, a department and agency of the United States, in that he stated, to said department and agency that:
>
> 'Since Mr. Michael Cohen was released from prison on October 9, 1955, I have been a personal friend of Mr. Cohen and associated with him in a purely social manner.

[1] The notice, which is entitled, "notice of appeal," is complete in all respects, except that it does not expressly state that Sica appeals. No question of its sufficiency is raised by appellee. It was sufficient. See *Poe v. Gladden* 9 Cir., 1961, 287 F.2d 249, 251; *Yanoze v. Weyerhaeuser Steamship Co.*, 9 Cir., 1959, 274 F. 2d 274, 282-83.

'Since January 1, 1955, I have not received any moneys from Mr. Cohen; nor have I paid any moneys to Mr. Cohen. During the period January 1, 1955, to date, I have not received any moneys from anyone acting on Mr. Cohen's behalf; nor have I paid any moneys to anyone on Mr. Cohen's behalf.

'During the period January 1, 1955, to date, I have had no business connections or negotiations with Mr. Cohen, directly or indirectly . . .

'During the period January 1, 1955, to date, I have made no substantial gifts to Mr. Cohen; nor has Mr. Cohen made any gifts to me, other than a wrist watch as a birthday gift in September 1957.

'During the period January 1, 1955, to date, I have made no loans to Mr. Cohen; nor did he make loans to me.

'During the period January 1, 1955, to date, I have participated in no financial transactions to which Mr. Cohen also was a party;' "

Sica was represented at the trial by experienced counsel of his own choice and is represented by the same counsel on appeal. Two contentions are made: first, that the evidence was insufficient to sustain the verdict, and second, that there was error in receiving in evidence a letter, Exhibit 10, and three checks, Exhibits 11, 12, and 13. We conclude that the evidence is sufficient and that there was no error or prejudice in receiving the exhibits in question.

The statements quoted above from the indictment were made by Sica in an affidavit. The record shows,

largely by stipulation, that the Intelligence Division of the Internal Revenue Service of the Treasury Department was investigating the income tax liability of one Michael Cohen; that agents of the Service met with Sica; that they informed him that they were conducting an investigation into Cohen's tax liability and financial status; that they wanted an affidavit from Sica covering the financial transactions and anything he knew about it; that they questioned him, and agent Crabtree took notes; that Crabtree then prepared the affidavit which was submitted to Sica, who checked it with his attorney and then told the agents that his attorney had "okehed" his signing the affidavit; that he then did so and delivered it to the agents.

Counsel objected that the facts stated in the affidavit were not "material" within the meaning of 18 U.S.C. §1001.[2] They agreed, however, that, to quote one of them, the materiality was "a matter for the court to determine." The court overruled the objection.

The foregoing facts had been presented to the court in the absence of the jury. When government counsel offered evidence to prove them, the court replied in part: "I don't think we need to call them [the witnesses] in view of the stipulation. That is a matter on which the court will instruct the jury." Defense counsel made no objection. The court, in instructing the

[2] §1001. Statements or entries generally. Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

jury, stated to them: "Materiality is a question for the court, and I charge you as a matter of law that the statements alleged in Count Two of the Indictment were pertinent to the issue pending within the jurisdiction of the Internal Revenue Service." When the jury had been fully instructed, the court asked counsel to approach the bench, at which time the following statements were made:

"Mr. Sheridan: The government has no exceptions.

Mr. Parsons: We have none, Your Honor."

The government sought to show, entirely by circumstantial evidence, that Sica had been associated with Cohen in a business way rather than in a purely social manner, and that, directly or indirectly, he had received moneys from Cohen or from persons acting on Cohen's behalf, and that he had had business connections with Cohen.

Various witnesses testified to the following facts: In November of 1957, there existed in Los Angeles what the witnesses described as "a competitive situation" between Coast Cigarette Service and Rowe Cigarette Service. Both companies were attempting to obtain locations for their automotic cigarette vending machines and were paying push money in the form of "bonuses" and "advances." One Breen, a salesman for Coast, was approached by Sica who said that he could get some locations for Coast and that he thought his services would be worth $25,000 to Coast. One Carr, manager of Coast, testified that men from Coast's parent company had come from outside the Los Angeles area to help Coast in the competition. Carr had also retained a private investigator named Otash.

A witness named Harry Rudolph, better known as Babe McCoy, who was once Cohen's manager when the latter was a boxer, met in New Orleans with Vaughn and Angelo, employed by a company affiliated with Rowe. Vaughn and Angelo then came to Los Angeles and McCoy arranged for them to meet in his apartment with Cohen and Sica. Vaughn was dead at the time of the trial, but Angelo testified that the trip to Los Angeles was in connection with the competitive situation between Rowe and Coast and that Angelo worked in Los Angeles under the direction of one Seedman, president of Rowe, as a salesman attempting to obtain locations for Rowe. It was stated at the meeting that Coast was trying to get Cohen to help Coast against Rowe and that Vaughn, although not interested in employing Cohen, was interested in having Cohen remain neutral and not hurt Rowe in any way. So far as appears, although Sica was present during the entire discussion, he said nothing. That same evening, Angelo, Cohen, Sica and Vaughn had dinner together, and Angelo saw Cohen and Sica subsequently several times, about five.

Seedman testified that he was instrumental in persuading Vaughn to come to Los Angeles. On November 27, 1957, he drew a check on his company's account, payable to himself, in the sum of $5,000. He cashed it at a bank, receiving $100 bills. He put the money in a plain envelope and handed it to Vaughn. The two then proceeded to a restaurant where they met Sica. Later Cohen arrived. Vaughn handed the envelope containing the money to Cohen. Cohen said that it "should be Fred's," or words to that effect ("Fred" meant Sica). The envelope was passed to Sica.

Otash, who had been employed by Carr as a private investigator for Coast, testified that his work related to the location of cigarette vending machines and that in connection with this work he made certain recordings which he played for Seedman and Cohen. Sica was not present when this occurred. Later Vaughn, who, as we have seen, worked for Rowe, handed Cohen five $100 bills which Cohen handed to Otash. This was also at a restaurant and Sica was in the restaurant, but not at the table.

Vaughn returned to Los Angeles in December, and Seedman saw Cohen and Sica at Vaughn's room. Later, Seedman reimbursed Vaughn for the expenses incurred by Vaughn on his trip to Los Angeles in the sum of $3,358.53. This was pursuant to a statement contained in a letter from Vaughn to Seedman which is Exhibit 10, about which appellant now complains. Exhibit 11 is the check that Seedman gave Vaughn. Seedman also drew a check on his company payable to himself in the sum of $3,000. This is Exhibit 12. He then drew a check on his own bank account in the same amount and gave it to Vaughn. This is Exhibit 13. These two checks, according to Seedman, were made in response to Exhibit 10 which refers to "$3,000 advanced to M.C." Seedman also identified another Rowe check for $500 payable to Vaughn as having been given to Vaughn in connection with the Otash transaction. One Gintz, an attorney, testified that he obtained from Vaughn $3,000 which he delivered to Cohen. Cohen testified that he received $3,000 from Vaughn.

In summing up the testimony in a memorandum prepared at the time when it denied Sica's motion for

judgment of acquittal and motion for a new trial, the trial court remarked that some of the witnesses were obviously reluctant, and concluded that the evidence shows that Sica did participate in financial transactions to which Cohen was also a party and did associate with Cohen in other than a purely social manner. We agree with the trial court that the most telling evidence is the payment of $5,000 to Sica by Seedman, or by Vaughn, through or upon the instructions of Cohen. The trial court also stated: "The court and jury would be naive indeed to conclude that the defendant's participation in these various meetings was in 'a purely social manner.'" We agree. We are satisfied that, viewing the evidence in the light most favorable to the government,[3] the verdict is supported.

There is no merit in the argument that, because Sica was also indicted in another count for violating 26 U.S.C. §7201 by willfully filing a false income tax return, in failing to report as income the $5,000 received from Seedman through Vaughn or Cohen, and was acquitted, the jury must have found that he did not receive the $5,000, so that the evidence relating to that money must be disregarded. The jury could also have found that he did receive the money, but believed that it was not taxable. (See *Cafe v. United States*, 9 Cir., 1960, 283 F.2d 430, 436)

The record makes it clear that Sica's counsel agreed with the position of government counsel, namely that the question as to whether the statements contained in the affidavit were material within the meaning of sec

[3] See *Castro v. United States*, 9 Cir., 1963, ... F.2d ... (Aug. 2, 1963), and cases there cited in footnotes 1 and 2.

tion 1001 is a question of law for the court.[4] Assuming, in spite of the fact that no objection was made to the instructions to the jury (see Rule 30, F.R.Crim. Proc.), that the question is properly before us, we hold that the contents of the affidavit were material within the meaning of section 1001.[5]

There was neither error nor prejudice in admitting Exhibits 10, 11, 12, and 13. They were objected to as hearsay and the court heard considerable argument, not all of which is reported in the transcript, before overruling the objection. In its memorandum on denial of Sica's motion for judgment of acquittal and for a new trial, the trial court said:

> "Where, however, it is relevant and material to a case that a statement was in fact made or that a conversation or discussion had in fact been held and no effort is made to use the statement or conversation as proof of the truth of the matter asserted, such evidence is not barred by the rule excluding hearsay evidence."

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[4] This position is legally correct. See *Sinclair v. United States*, 1929, 279 U.S. 263, 298; *Stanton v. United States*, 9 Cir., 1963, ... F.2d ... (July 24, 1963), and cases there cited; *Weinstock v. United States*, D.C. Cir., 1950, 231 F.2d 699, 703.

[5] Judge Prettyman says that the "test is whether the false statement has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made." *Weinstock v. United States*, *supra*, at 701-2. Here, the "tribunal" is the Intelligence Division of the Internal Revenue Service, and the "determination" would be as to further investigation and the direction it might take. If Sica had told the truth, that would have had a natural tendency to influence the "tribunal" in making its "determination"; the deception would likewise have such a tendency. See also *Neely v. United States*, 9 Cir., 1962, 300 F.2d 67, 71-72; *Brandow v. United States*, 9 Cir., 1957, 248 F.2d 55, 58-63; *Pitts v. United States*, 9 Cir., 1959, 263 F.2d 353; *Cohen v. United States*, 9 Cir., 1953, 201 F.2d 380, 392.

In other words, the court was of the view, which we think is correct, that Exhibit 10, a letter from Vaughn to Sica, detailing his expenses and asking for reimbursement, was admissible, not as proof of the truth of the statements made, but as further evidence that Vaughn and Seedman's relationships, which, as shown by other evidence, also included Cohen and Sica, were of a business character.[6] The checks, Exhibits 11, 12, and 13, were identified by Seedman as having been drawn in response to Exhibit 10, and the testimony of attorney Gritz, corroborated by checks, Exhibits 6 and 7, shows that the $3,000 involved was in fact paid by Vaughn to Cohen. None of this evidence purports to show or could be taken by any intelligent juror as showing that any of the particular moneys referred to went to Sica. It was simply a part of the circumstantial evidence showing that the dealings between Vaughn, Angelo, Seedman and Cohen, in which Sica was shown by other evidence to have participated, was of a business and not a social character.

Under these circumstances, it was not error to admit the evidence. If evidence, otherwise hearsay, falls within any exception to the hearsay rule, it is admissible. This follows from Wigmore's basic principle that "all facts having rational probative value are admissible, unless some specific rule forbids." (1 Wigmore, Evidence, 3d ed. 1940, §10, p. 293). Moreover, this evidence was not within the hearsay rule at all. "The Hearsay rule forbids merely the use of an extra judicial utterance as an assertion to evidence the fact asserted. . . . If, then, an utterance can be used as circumstantial evidence, *i.e.* without inferring from it as an assertion to

[6] See *Busby v. United States*, 9 Cir. 1961, 296 F.2d 328, 332.

the facts asserted . . . the Hearsay rule does not oppose any barrier, because it is not applicable." (Ibid. vol. VI, §1788, p. 234.)

It would have been proper for Sica's counsel to ask the court to instruct the jury as to the purpose for which these documents were deemed admissible and to caution them that Exhibit 10 was not evidence of the truth of the statements that it contained. The court, however, was not obliged to give such an instruction unless asked to do so. The law wisely places upon counsel the duty to request it. For all that we know, Sica's counsel, who are experienced attorneys, may well have felt that such an instruction would tend to over-emphasize the importance of Exhibit 10 in the eyes of the jury, and may have elected not to ask for the instruction for that reason. Under these circumstances there is no affirmative obligation on the trial judge in a criminal case to give such a limiting instruction when counsel does not ask for it.[1]

It is not an answer to the foregoing to say that the trial court did not indicate to counsel why he was admitting the exhibits over the objection that they were hearsay. The trial court is not required to explain each of its rulings to counsel. Counsel, too, are supposed to know the law applicable to the case they are trying. We do not presume error; we require the appellant to demonstrate it. The record indicates that there was more than one unreported argument about the matter, and we would be going a long way to presume that in the

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[1] *Stevens v. United States*, 9 Cir., 1958, 256 F.2d 610, 623. See also *United States v. Smith*, 2 Cir., 1960, 283 F.2d 700. Compare *Hopkinson v. United States*, 9 Cir., 1957, 248 F.2d 864; *United States v. Hendrix*, 2 Cir., 1958, 260 F.2d 881; *Malatesta v. United States*, 1 Cir., 1958, 170 F.2d 905. We have applied the same rule in a civil case. *J. A. Riley Investment Co. v. Salona*, 9 Cir., 1940, 110 F.2d 845.

course of this discussion the reasons why these documents should be admitted were not stated by government counsel and by the trial court."

Furthermore, even if we are in error as to the admissibility of the documents and as to the duty of counsel to request a limiting instruction, we can find no prejudice. Seedman testified as to the making of the payments referred to in the letter and could have done so if the letter had not been offered in evidence. Gritz and Cohen both testified as to Vaughn's payment to Cohen. The letter was thus purely cumulative and under the circumstances we cannot find that its admission, even assuming that it was erroneous, was prejudicial." We need not decide whether, as the government tentatively suggests, Vaughn being dead, the letter could have been admitted under the principles discussed by us in *LaPorte v. United States*, 9 Cir., 1962, 300 F. 2d 878, 882 n. 20.

Affirmed.

Foley, Senior District Judge (Dissenting):

One of the questions presented by the appeal was, "Were Exhibits 10, 11, 12 and 13 properly admitted over the objection of hearsay?" In support of their position the majority states:

> "There was neither error nor prejudice in admitting Exhibits 10, 11, 12 and 13. They were ob-

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"The case of *Hayes v. United States*, 9 Cir., 1963, 314 F. 2d 293, cited in the dissenting opinion, is not pertinent here. No claim of error is made in reliance upon 28 U.S.C. §2255 [b], as was claimed in *Hayes*. The record here does not, on its face, show error as the dissent asserts because the documents were admissible.

"Cf. *Baden v. United States*, 9 Cir., 1960, 282 F. 2d 420, 429; *Stevenson v. United States*, supra, note 8, at 625; *Papadakis v. United States*, 9 Cir., 1953, 208 F. 2d 945, 952; *Hadjo v. United States*, 9 Cir., 1946, 157 F. 2d 630, 632-33.

jected to as hearsay and the court heard considerable argument, not all of which is reported in the transcript, before overruling the objection. In its memorandum on denial of Sica's motion for judgment of acquittal and for a new trial, the trial court said:

> "'Where, however, it is relevant and material to a case that a statement was in fact made or that a conversation or discussion had in fact been held and no effort is made to use the statement or conversation as proof of the truth of the matter asserted, such evidence is not barred by the rule excluding hearsay evidence.'"

After a discussion as to the views of the Trial Court in admitting Exhibit 10, the majority's opinion continues:

> "Under these circumstances, it would have been proper for Sica's counsel to ask the court to instruct the jury as to the purpose for which these documents were deemed admissible and to caution them that Exhibit 10 was not evidence of the truth of the statements that it contained. The court, however, was not obliged to give such an instruction unless asked to do so. The law wisely places upon counsel the duty to request it."

Then the Court's opinion goes on to say:

> "It is not an answer to the foregoing to say that the trial court did not indicate to counsel why he was admitting the exhibits over the objection that they were hearsay. The record indicates that there was more than one unreported argument about the matter, and we would be going a long way to presume that in the course of this discussion the rea-

sons why these documents should be admitted were not stated by government counsel and by the trial court. The trial court is not required to explain each of its rulings to counsel. Counsel, too, are supposed to know the law applicable to the case they are trying. We do not presume error: we require the appellant to demonstrate it."

The record does not disclose that defendant or his counsel were at any time informed during the course of the trial that Exhibit 10 was to be admitted for the purpose only of establishing that Vaughn's statements were made, and not for the purpose of determining whether or not the statements, or any of them, were true or false; and counsel were not informed that Exhibits 11, 12, and 13 were admitted for a limited purpose, or purposes, only. Therefore counsel had no occasion to request the Court to instruct the jury that the admission of any of the Exhibits 10, 11, 12, and 13 was for limited purposes. Counsel cannot be said to have waived the point by failure to so request.

The majority contends that:

"Furthermore, even if we are in error as to the admissibility of the documents and as to the duty of counsel to request a limiting instruction, we can find no prejudice."

The question of whether there was prejudice cannot be so lightly disposed of.

In *Kotteakos v. United States*, 328 U. S. 750, 761, Mr. Justice Rutledge, speaking for the Supreme Court, had the following to say:

"The 'hearsay' rule is often grossly artificial. Again in a different context it may be the very

essence of justice, keeping out gossip, rumor, unfounded report, second, third, or further hand stories."

Then on p. 762:

"The statute in terms makes no distinction between civil and criminal causes. [Sec. 269 of the Judicial Code, as amended (28 U.S.C. §391)—now 28 U.S.C.Civ.Proc.R. 59, 61; 18 U.S.C.Cr. Proc.R. 33, 52]. But this does not mean that the same criteria shall always be applied regardless of this difference. * * * Nor does §269 mean that an error in receiving or excluding evidence has identical effects, for purposes of applying its policy, regardless of whether the evidence in other respects is evenly balanced or one-sided. Errors of this sort in criminal causes conceivably may be altogether harmless in the face of other clear evidence, although the same error might turn scales otherwise level, as constantly appears in the application of the policy of §269 to questions of the admission of cumulative evidence. So it is with errors in instructions to the jury. Cf. United States v. Socony-Vacuum Oil Company, supra, at 239, 241.

"Some aids to right judgment may be stated more safely in negative than in affirmative form. Thus, it is not the appellate court's function to determine guilt or innocence. Weiler v. United States, supra, at 611 [323 U.S.]; Bollenbach v. United States, 326 U.S. 607, 613-614. Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. Appellate judges cannot escape such impressions. But

they may not make them sole criteria for reversal or affirmance. Those judgment are exclusively for the jury, given always the necessary minimum evidence legally sufficient to sustain the conviction unaffected by the error. Weiler v. United States, supra; Bollenbach v. United States, supra.

"But this does not mean that the appellate court can escape altogether taking account of the outcome. To weigh the error's effect against the entire setting of the record without relation to the verdict or judgment would be almost to work in a vacuum. Cf. United States v. Socony-Vacuum Oil Co., supra, at 239, 242. In criminal causes that outcome is conviction. This is different, or may be, from guilt in fact. It is guilt in law, established by the judgment of laymen. And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. IT IS RATHER WHAT EFFECT THE ERROR HAD OR REASONABLY MAY BE TAKEN TO HAVE HAD UPON THE JURY'S DECISION. THE CRUCIAL THING IS THE IMPACT OF THE THING DONE WRONG ON THE MINDS OF OTHER MEN, NOT ON ONE'S OWN, IN THE TOTAL SETTING. Cf. United States v. Socony-Vacuum Oil Co., supra, at 239, 242; Bollenbach v. United States, supra, 614. [Emphasis added.]

"THIS MUST TAKE ACCOUNT OF WHAT THE ERROR MEANT TO THEM, NOT SINGLED OUT AND STANDING ALONE, BUT IN RELATION TO ALL ELSE THAT HAPPENED. AND ONE MUST JUDGE

OTHERS' REACTIONS NOT BY HIS OWN, BUT WITH ALLOWANCE FOR HOW OTHERS MIGHT REACT AND NOT BE REGARDED GENERALLY AS ACTING WITHOUT REASON. THIS IS THE IMPORTANT DIFFERENCE, BUT ONE EASY TO IGNORE WHEN THE SENSE OF GUILT COMES STRONGLY FROM THE RECORD." [Emphasis added.]

As stated by the Trial Judge during the course of the trial (Rep. Tr. 167), this is a very close case, and it cannot be assumed that the statements contained in any of the Exhibits 10 to 13, inclusive, did not have substantial influence upon the jury in arriving at a verdict of guilty. The jury was not informed during the course of the trial, or by means of an instruction, that any of the Exhibits 10 to 13, inclusive, were admitted for limited purposes. It is therefore impossible for this Court to say to what extent any of these exhibits influenced the jury in returning its verdict of guilty; and we have no way of knowing to what extent, if at all, the jury's belief or disbelief in the truth of any of the statements contained in any of said exhibits influenced its verdict.

We cannot assume that the Trial Court, in the course of unreported discussions between Court and counsel, informed defendant and counsel that any of the Exhibits 10 to 13, inclusive, were admitted for a limited purpose, or purposes, only, and not for the purpose of determining whether or not the statements, or any of them, contained in any or all of said exhibits were true or false.

True, we cannot presume error. Likewise in the absence of a record showing that the Trial Court, in overruling the hearsay objection, admitted any of these exhibits for some limited purpose, or purposes, we cannot assume that in any unrecorded statements of the Judge he informed counsel that he was admitting these exhibits, or any of them, for a limited purpose or purposes.

The recorded proceedings on their face show error, viz., the admission of hearsay evidence over the general objection that they were hearsay. The absence in the record of anything showing that the Court admitted any of these exhibits for limited purposes results in the record as it now stands disclosing error. The objection here was a general one, viz., that the exhibits were hearsay or contained hearsay matter. Cf. *Brozen v. United States*, 9 Cir., 314 F.2d 293 (1963). In that case the record did not, on its face, show error. There the Court remanded for a hearing by the Trial Court to determine whether or not in the unreported argument of counsel error was committed.

All proceedings in criminal cases must be recorded verbatim by shorthand or by mechanical means. 28 U.S.C.A. §753(b). In *Brozen v. United States*, supra, at p. 295, failure to record closing arguments of counsel in violation of statutory command did not require reversal and new trial but merely vacation of judgment and remand for hearing to determine whether defendant was prejudiced by failure to record, where defendant had suggested no error that may have occurred in prosecutor's summation. In a footnote on p. 295 this Court stated:

"Appellant's argument would be without merit if presented in a collateral attack upon his convic-

tion. Although the requirement of Section 753(b)(1) that 'all' proceedings in open court in criminal cases be recorded is mandatory (Stephens v. United States, 289 F.2d 308, 309 (5th Cir. 1961)), we would think failure to record counsel's summation, without more, though error, is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure' (Hill v. United States, 368 U.S. 424, 428, 82 S.Ct. 468, 7 L.Ed. 2d 417 (1962)), and failure to record counsel's summation therefore would not, of itself, require the granting of collateral relief. However, if a denial of appellant's rights in some other respect were alleged, the absence of a record might be a significant factor in determining whether in all the circumstances there had been a denial of fundamental fairness. United States v. Taylor, 303 F. 2d 165, 169 (4th Cir., 1962)."

In the *Brown* case it was not alleged that there was error or impropriety in the argument of counsel and that therefore, failure to record counsel's summation would not of itself require the granting of a reversal. Here it is obvious that hearsay evidence was erroneously admitted and that the record fails to show that the admission of this hearsay was for any limited purpose.

As pointed out by Mr. Justice Rutledge in *Kotteakos v. United States*, supra (328 U.S. at 764), we cannot say that:

"If, when all is said and done, the conviction is sure that the error did not influence the jury, or

had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. Bruno v. United States, supra, at 294 [308 U.S.]. BUT IF ONE CANNOT SAY, WITH FAIR ASSURANCE, AFTER PONDERING ALL THAT HAPPENED, WITHOUT STRIPPING THE ERRONEOUS ACTION FROM THE WHOLE, THAT THE JUDGMENT WAS NOT SUBSTANTIALLY SWAYED BY THE ERROR, IT IS IMPOSSIBLE TO CONCLUDE THAT SUBSTANTIAL RIGHTS WERE NOT AFFECTED. THE INQUIRY CANNOT BE MERELY WHETHER THERE WAS ENOUGH TO SUPPORT THE RESULT, APART FROM THE PHASE AFFECTED BY THE ERROR. IT IS RATHER, EVEN SO, WHETHER THE ERROR ITSELF HAD SUBSTANTIAL INFLUENCE. IF SO, OR IF ONE IS LEFT IN GRAVE DOUBT, THE CONVICTION CANNOT STAND." [Emphasis added.]

As said in that case, the crucial thing is the impact of any of these exhibits on the minds of the jurors. In the absence of a limiting instruction, it is likely, and it would be natural for a juror to consider whether the statements contained in Exhibit 10 were true or false. All that appears in the record is that the objection on the ground of hearsay was overruled. Under the circumstances here, counsel was not obliged nor was it counsel's duty to ask the Court for a limiting instruction.

The Government suggests that Exhibits 11, 12, and 13 were without the ambit of the hearsay rule and were business records. 28 U.S.C.A. §1732. *Palmer v. Hoffman*, 318 U.S. 109, 111-114, is to the contrary.

This conviction should not stand. I would reverse.

(Endorsed) Opinion and Dissenting Opinion Filed November 18, 1963.

Frank H. Schmid, Clerk.

APPENDIX "B"

Judgment.

United States Court of Appeals, For the Ninth Circuit.

Alfred G. Sica, Appellant, vs. United States of America, Appellee. No. 18001.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered November 18, 1963.

APPENDIX "C"

Motion.

United States Court of Appeals, For The Ninth Circuit.

Alfred G. Sica, Appellant, vs. United States of America, Appellee. No. 18,011.

Comes Now, the Appellant, Alfred G. Sica, and respectfully moves the court:

First: That the petition for rehearing be granted and that the court remand the case to the United States District Court for the Southern District of California, for the purpose of taking evidence with reference to the subject of whether or not there was any limitation placed upon the receipt in evidence of Exhibits 10 to 13, inclusive.

Second: Whether or not counsel for the defendant were in any was notified by the court that any of the said exhibits were admitted for limited purposes.

The proceedings to be conducted in accordance with Brown vs. U. S. 9th Cir. 314 Fed 2d 293 (1963).

Dated at Los Angeles, California this 13th day of December, 1963.

Russell E. Parsons

Russell E. Parsons, Attorney for Appellant, Alfred G. Sica.

Affidavit of Russell E. Parsons, in Support of Motion.

United States Court of Appeals For the Ninth Circuit.

Alfred G. Sica, Appellant, vs. United States of America, Appellee. No. 18,011.

State of California, County of Los Angeles—ss.

Russell E. Parsons, being first duly sworn, upon oath, deposes and says:

That he is one of the lawyers who conducted both the trial and the appeal in this matter. That Mr. Brumbaugh has since passed away and is therefore not now on this motion or the accompanying petition for rehearing.

That affiant makes this affidavit in support of a motion to remand this case to the United States District Court for the Southern District of California for the purpose of taking evidence upon the admissibility of Exhibits 10, 11, 12 and 13, and whether or not the Exhibits were admitted for limited purposes and further whether or not counsel were so advised by the trial court.

Affiant respectfully urges that he has examined the file and observed the numerous objections which counsel made during the course of the trial and has given considerable thought to this matter and verily believes that the exhibits were not admitted for a limited purpose nor was any limitation placed upon them and at no time was there ever any understanding on the part of counsel for the appellant that said Exhibits were to be or might be admitted for a limited purpose. That after examining the opinion carefully it would appear that justice would be best served if a rehearing is granted

in the matter and an order made remanding the case to the United States District Court for the Southern District of California, pursuant to Brown vs. United States, Ninth Circuit, 314 Fed. 2d 293 (1963), for the purpose of taking testimony upon this question.

Wherefore, affiant respectfully prays that such an order be made.

Russell E. Parsons

Russell E. Parsons

Subscribed and sworn to before me this 13th day of December, 1963.

Armida Bay

Notary Public in and for said County and State

APPENDIX "D"

Order Denying Petition for Rehearing and Motion.

United States Court of Appeals. For the Ninth Circuit.

Alfred G. Sica, Appellant, vs. United States of America, Appellee. No. 18,011.

Filed: Jan. 13, 1964.

Before: Jertberg and Duniway, Circuit Judges, and Foley, Sr., District Judge.

The petition for rehearing filed herein on December 16, 1963 and the motion filed herein on the same date are each hereby denied.

It Is Hereby Ordered that there be stricken from the 12th line of page 7 of the printed slip opinion in the above case the word "Sica," and that there be inserted in lieu of that word the word "Seedman."

District Judge Foley, Sr. voted in favor of granting the petition for rehearing and the motion.

Gilbert H. Jertberg
Ben C. Duniway
United States Circuit Judges
Roger T. Foley, Sr.
United States District Judge

APPENDIX "E"

Petition for Rehearing by Alfred G. Sica.

United States Court of Appeals For the Ninth Circuit.

Alfred G. Sica, Appellant, vs. United States of America, Appellee. No. 18,011.

To the Honorable Judges of the Above Entitled Court:

Comes now the Appellant, Alfred G. Sica, and respectfully petitions the above entitled Court for a rehearing as to him and urges:

I.

THERE WAS ERROR IN RECEIVING IN EVIDENCE THE LETTER, EXHIBIT 10, AND THE THREE CHECKS, EXHIBITS 11, 12 AND 13. THE APPELLANT WAS PREJUDICED AND THIS COURT ERRED IN APPROVING THE RECEIPT OF THE COMPLAINED-OF EXHIBITS IN EVIDENCE AND IN HOLDING NO PREJUDICE RESULTED TO APPELLANT.

We respectfully urge that this learned Court, in the majority Opinion, is mistaken and in error in the following: The Opinion provides at page 7.

> "In other words, the Court was of the view, which we think is correct, that Exhibit 10, a letter from Vaughn to Sica, detailing his expenses and asking for reimbursement, was admissible, not as proof as truth of the statements made, but as further evidence that Vaughn and Seedman's relationships, which, as shown by other evidence also included Cohen and Sica, were of a business charac-

ter. The checks, Exhibits 11, 12 and 13, were identified by Seedman as having been drawn in response to Exhibit 10. . . ."

We respectfully direct the Court's attention to the Official Court Reporter's Transcript of the testimony, commencing at page 136 through page 140. We also direct the Court's attention to Exhibit 10 itself. This was a memorandum to Seedman from Vaughn, not to Sica. Had it been to Sica, we probably could not have made an objection that it was hearsay. It was to Seedman without any evidence to the effect that Sica had any knowledge of this transaction whatsoever. It was plainly hearsay and the Court erred in admitting it, and this Court in approving its reception in evidence. It cannot safely be argued, we respectfully urge, that Sica was not thus prejudiced. The checks, of course, were identified by Seedman as having been made in response to the request from Vaughn.

II.

THE COURT ERRED IN OVERRULING THE HEARSAY OBJECTION AND ADMITTING THE EVIDENCE WITHOUT ANY RESTRICTIONS WHATSOEVER.

This Court suggests that counsel for the appellant should have tendered an objection or made a request that some limitation be given by way of instruction on the receipt of this evidence. That was not our duty. We would have been derelict in our duty to our client had we done so. This evidence was clearly hearsay. We had a right to make the objection; we did; and we had a right to stand upon it. There was no limitation whatsoever, and the record bears us out, we respectfully urge.

A rehearing should be granted in this matter and the case referred to the District Court for the taking of evidence upon the question of the admission of these exhibits and whether or not there was any limitation placed thereon. The record before this Court fails to show any limitation. We respectfully urge that the procedure suggested in the learned dissenting Opinion should be followed.

See *Brown v. United States*, 9 Cir., 314 F.2d 293 (1963).

The exhibits were not admissible as business records and are not within the exception to the hearsay rule. We respectfully direct the Court's attention, in brevity, to pages 2 to 4 of our Closing Brief, where this subject is discussed with substantial authority for our position.

III.

THE GRITZ INCIDENT.

This testimony does not involve Mr. Sica at all. It was received over objection (RT 112), with the Court's comment, "I am assuming it will be connected up."

Over objection, Exhibits 6 and 7 were received. They were not connected to Sica in any manner (RT 74-78); it was a loan from Vaughn to Cohen (RT 77-81).

An examination of this testimony demonstrates this was a loan between these two alone.

CONCLUSION.

We respectfully ask that a Rehearing be granted herein.

We further ask that the matter be remanded to the United States District Court for a hearing on the question as to whether or not there were, in fact, any limi-

tations placed on receipt of the complained-of evidence, and whether or not counsel was informed that the evidence was to be received for a limited purpose.

Further, we respectfully ask that the matter be referred to the Court for hearing en banc.

Respectfully submitted,

Russell E. Parsons,
Attorney for Petitioner,
Alfred G. Sica

CERTIFICATE OF COUNSEL:

State of California, County of Los Angeles—ss

I, Russell E. Parsons, attorney for the Appellant Alfred G. Sica, do hereby certify that, in my opinion, the Petition for Rehearing is well founded, and that it is not interposed for delay.

Dated at Los Angeles, California, this 13th day of December, 1963.

Russell E. Parsons

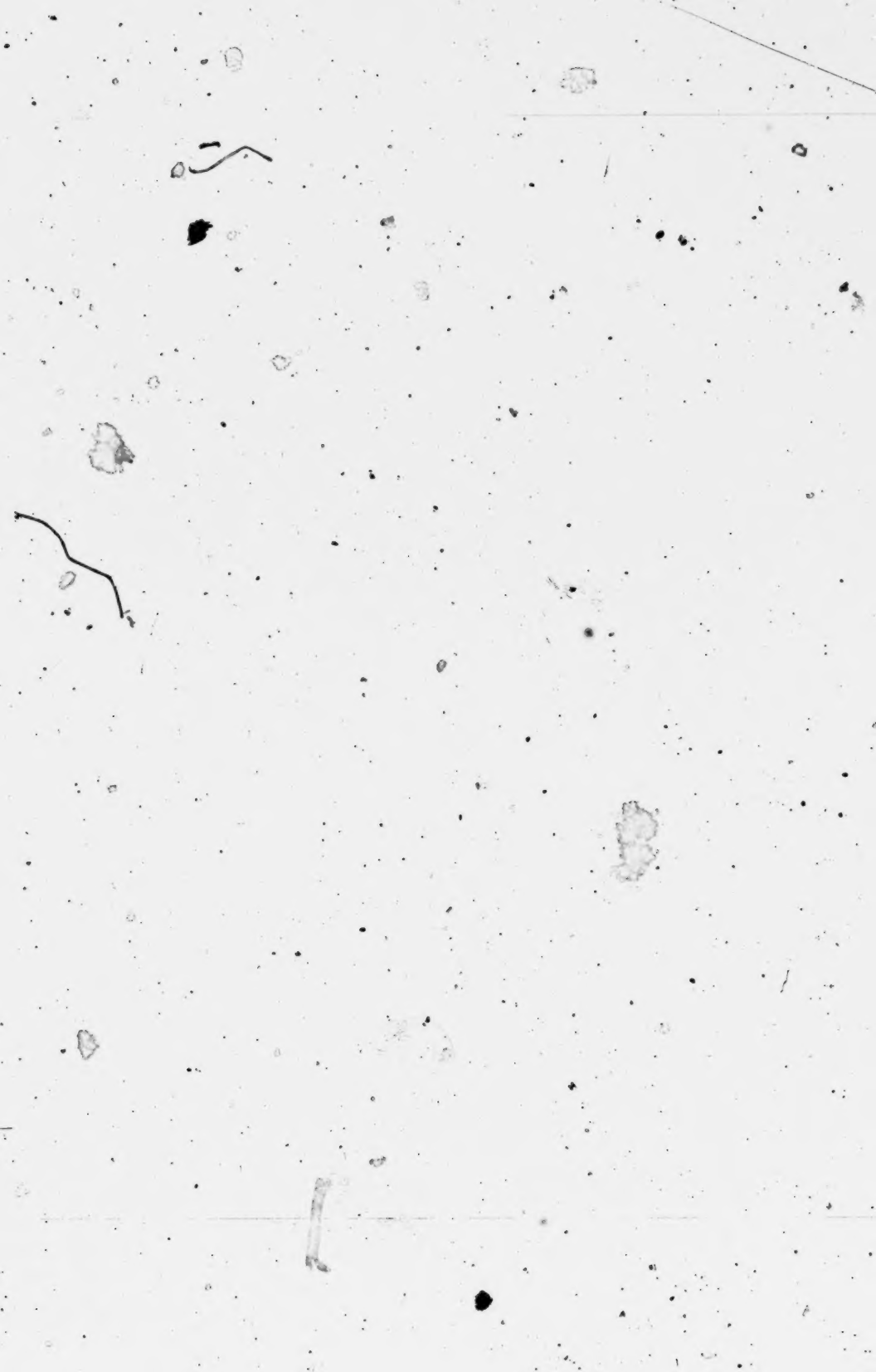
APPENDIX "F"

FOURTEENTH AMENDMENT:

"1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

18 U. S. C. 1001:

"Statements or entries generally. Whoever in a manner within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme or device a material fact or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000.00, or imprisoned not more than 5 years, or both."



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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 820

ALFRED G. SICA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the district court denying the motion for acquittal or for new trial (O.R. 48–60)[1] is not reported. The opinion of the court of appeals is reported at 325 F. 2d 831.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21) was entered on November 18, 1963, and a petition for rehearing was denied on January 13, 1964 (Pet.

[1] The record in this court consists of two volumes: The reporter's typewritten transcript of the proceedings at the trial, designated herein as "R."; and the clerk's original record of all other proceedings in the case, including those in the court below, designated herein as "O.R."

App. 25). The petition for a writ of certiorari was filed on February 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict.

2. Whether the trial court improperly admitted certain evidence to which objection was made on the ground that it was hearsay.

STATUTE INVOLVED

18 U.S.C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner was indicted in the United States District Court for the Southern District of California on March 17, 1961, on charges of (1) wilfully attempting to evade his individual income taxes for the year 1957, in violation of Section 7201 of the Internal Revenue Code of 1954; and (2) wilfully making a false and fraudulent statement in a matter within the jurisdiction of the Internal Revenue Service,

in violation of Section 1001 of the Criminal Code. (O.R. 2–5.) After a jury trial he was acquitted on the first count, convicted on the second, and sentenced to serve three years in prison and to pay a $2,000 fine. (O.R. 44.)

Count II, on which petitioner was convicted, alleged, *inter alia*, that the false statement was made on November 13, 1958, when he stated in an affidavit that (O.R. 4–5):

> Since Mr. Michael Cohen was released from prison on October 9, 1955, I have been a personal friend of Mr. Cohen and associated with him in a purely social manner.
>
> Since January 1, 1955, I have not received any moneys from Mr. Cohen; nor have I paid any moneys to Mr. Cohen. During the period January 1, 1955, to date, I have not received any moneys from anyone acting on Mr. Cohen's behalf; nor have I paid any moneys to anyone on Mr. Cohen's behalf.
>
> During the period January 1, 1955, to date, I have had no business connections or negotiations with Mr. Cohen, directly or indirectly * * *.

The indictment further alleged that in fact petitioner well knew that he had participated in financial transactions to which Cohen was a party, that petitioner had associated with Cohen in other than a purely social manner, and that he had business connections and negotiations with Cohen during the pertinent period. (O.R. 4–5.)

The evidence of petitioner's guilt on this count may be summarized as follows:

In the latter part of 1957, there was unusually severe competition in California between two cigarette vending machine companies, Coast Cigarette Service and Rowe Service Company ("Coast" and "Rowe"). In order to obtain locations in which to install their vending machines, Coast and Rowe began paying location owners cash bonuses and advances against future earnings which averaged about 50% higher than the usual rates. (R. 19–21, 28, 107, 121.) Breen, a salesman for Coast (R. 8–9), first met petitioner in 1957 at the office of a distributor for manufacturers of vending machines (R. 10, 25). Breen, petitioner and the distributor all went to the apartment of Michael Cohen—who had been a friend of petitioner for about 25 years (R. 66, 94)—and there engaged in a discussion of coffee vending machines (R. 11–12). Breen again met petitioner late in 1957 at the office of the same distributor. There was a conversation touching on the subject of cigarette machines and petitioner asked Breen to introduce him to his superior, Carr (R. 12–13)—the manager and vice-president of Coast (R. 25)—because petitioner wanted to get some machine locations for Coast (R. 12–14). Petitioner stated that his services would be worth about $25,000 to Coast (R. 15), but Carr did not appear to be interested in the proposal and the introduction was never made (R. 17–18, 27).

Rowe's California offices were in charge of one Seedman (R. 28, 45), who, late in 1957, called in two members of a New Orleans affiliate of Rowe—Vaughn and Angelo—to assist him in the competition with Coast (R. 38, 44–49, 53–54, 123). There was a dis-

cussion in the apartment of one McCoy among Cohen, petitioner, Angelo, Vaughn and McCoy (R. 33, 36–39, 50–53), relating to the efforts of Coast to get Cohen to "help them out" against Rowe (R. 53) and in Rowe's interest in having Cohen remain "neutral, not hurting [Rowe] in any way * * *." (R. 54).

On November 27, 1957, Seedman cashed a [Rowe] company check for $5,000, obtaining fifty $100 bills which he put into a white envelope. (R. 125–126.) Seedman turned the envelope over to Vaughn on the same day (R. 126) after which Seedman and Vaughn went to lunch at the "Brown Derby" with petitioner and Cohen (R. 127). During the lunch Vaughn handed the envelope to Cohen, who said, "That should be Fred's" (R. 128), meaning petitioner (R. 127), or, "This should go to Fred" (R. 129), whereupon Vaughn handed the envelope to petitioner (R. 131–132). A few days later, Vaughn wrote two checks to Cohen totalling $3,000 and caused them to be delivered to Cohen, who negotiated them. (Govt. Exs. 6, 7; R. 74–78, 111–112.)

Upon Vaughn's return to New Orleans in mid-December, 1957 (the competitive situation between Coast and Rowe having eased somewhat following his and Angelo's visit to Los Angeles—R. 64), Vaughn wrote to Seedman, forwarding an invoice detailing his expenses in the amount of $3,558.50, and asking—in the transmittal letter—that Seedman reimburse him and add $3,000 to the total to cover the two checks which Vaughn had "advanced to M.C. for which I [Vaughn] have borrowed the money from [Rowe's New Orleans affiliate] to cover same" (Govt.

Ex. 10; R. 138, 145–146). Seedman drew a check in Vaughn's favor on Rowe's account dated December 24, 1957, in the amount of $3,558.50 to cover Vaughn's expenses. (Govt. Ex. 11; R. 136–137.) Seedman drew another Rowe check in his own favor to cover the $3,000 advance (Govt. Ex. 12; R. 137), and a personal check against his (Seedman's) account in favor of Vaughn for $3,000 (Govt. Ex. 13; R. 138). Neither Seedman nor the Rowe organization has ever been repaid any of the $5,000 turned over to petitioner in currency (*supra*, p. 5) or the $6,558.50 paid to Vaughn by the above checks. (R. 147.)

ARGUMENT

1. There is no substance to the argument (Pet. 20–27) that the evidence was insufficient to support the jury's verdict of guilty. The evidence briefly sketched above points clearly to the conclusion that petitioner knowingly lied when he submitted the affidavit in question to officials of the Internal Revenue Service after clearing it with his attorney (R. 159–160); that his relationship with Cohen—whose tax liability the Service was investigating (Pet. App. 3)—far from being a "purely social" one (*supra*, p. 3), involved substantial financial dealings which might well have thrown light on Cohen's true income tax liability; and that his receipt from Seedman of the $5,000 in currency, standing alone, establishes the falsity of petitioner's sworn statement that he had "had no business connections or negotiations with Mr. Cohen, directly or indirectly * * *" (*supra*, p. 3). The contention that the $3,000 payment from

Seedman to Cohen (transmitted through Vaughn—Pet. 21–22) was merely a loan not only emphasizes unduly the importance of this particular transaction but relies entirely upon the highly dubious testimony of Cohen. The trial judge quite properly denied the motion for acquittal.[2]

Petitioner also argues (Pet. 22–27) that Congress did not intend that Section 1001 should apply to the kind of situation presented by this case. He suggests that Section 1001 overlaps the perjury statute (18 U.S.C. 1621) and hence this Court should "clarify this situation and prevent any duplication or overlapping of the statutes" (Pet. 23). It is, of course, frequently true that a single act or transaction violates more than one provision. *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 45; *United States* v. *Gilliland*, 312 U.S. 86, 95–96; *United States* v. *Noveck*, 273 U.S. 202, 206–207. The short of the matter is that Section 1001, when construed, as it should be, "according to its literal and natural import" (*United*

[2] In denying the motion for acquittal, the district judge stated (O.R. 57):

"There is direct evidence of Sica's approach to Coast with the suggestion that he had a deal where he thought his services would be worth in the neighborhood of $25,000 to Coast. He was subsequently present at all the key times and places in the negotiations between Vaughn, Seedman and Cohen. The defendant was present at McCoy's when Angelo overheard the discussion with respect to Vaughn's interest in Mickey Cohen remaining neutral. There is direct testimony that Cohen said that the envelope Vaughn laid on the table at the Brown Derby belonged to "Fred". The jury could properly find from Seedman's testimony that he (Cohen) did not take it. The court and jury would be naive indeed to conclude that the defendant's participation in these various meetings was in 'a purely social manner.'"

States v. *Gilliland, supra,* pp. 90–91), manifestly covers the offense charged in this indictment and there is no reason why the legislative intent "should be frustrated by construction" (*Id.,* p. 93). See also, *United States* v. *Bramblett,* 348 U.S. 503, 509–510; *United States* v. *McCue,* 301 F. 2d 452, 455 (C.A. 2d), certiorari denied, 370 U.S. 939; *Spivey* v. *United States,* 109 F. 2d 181, 184–185 (C.A. 5th); *United States* v. *Silver,* 235 F. 2d 375, 377 (C.A. 2d).

Nor can there be any question that petitioner's affidavit was false in material respects, bearing directly, as it did, upon the Internal Revenue Service's investigation of Cohen's income tax liability. Indeed, as the court below pointed out (Pet. App. 4), petitioner made no objection to the trial judge's charge to the jury that "Materiality is a question for the court, and I charge you as a matter of law that the statements alleged in Count Two of the Indictment were pertinent to the issue pending within the jurisdiction of the Internal Revenue Service."

2. Also without merit is the contention (Pet. 14–20) that the district court erred in admitting in evidence Government Exhibits 10 through 13, Vaughn's invoice to Seedman, the transmittal letter which accompanied it, and the three checks written by Seedman to reimburse Vaughn (*supra,* p. 6). The court below (Judge Foley dissenting) disposed of the point on the ground that the exhibits did not appear to have been admitted as proof of the truth of the matters asserted therein, but merely as "further evidence that Vaughn and Seedman's relationships, which, as shown

by other evidence, also included Cohen and Sica, were of a business character." (Pet. App. 9.)[3] In addition, even assuming that the exhibits were admitted without any such limitation, they were admissible under the federal shop-book statute, 28 U.S.C. 1732. The question of admissibility arises mainly because Vaughn died before the trial (R. 44–45) and hence could not authenticate Exhibit 10 as his letter and invoice to Seedman. However, the purpose of the shop-book statute is to eliminate the need for the testimony of the person who made the record. *Palmer* v. *Hoffman*, 318 U.S. 109, 113. A copy of a letter kept in the usual course of business (as this apparently was) is admissible under the statute if there is satisfactory evidence that the original has been mailed. *Sheehan* v. *Municipal Light & Power Co.*, 151 F. 2d 65, 69 (C.A. 2d). Here, Seedman's possession of Government's Exhibit 10—together with the three canceled checks issued in response thereto (Government's Exhibits 11, 12 and 13)—is ample proof that the original was indeed mailed. And if a copy of the letter is admissible as a business record, certainly the three canceled checks—related so closely

[3] Although the record does not embrace what appear to have been rather extensive arguments on the admissibility of these documents (R. 141–144), the trial court, in its memorandum denying petitioner's motion for judgment of acquittal or for a new trial, stated (O.R. 58; Pet. App. 8):

"Where, however, it is relevant and material to a case that a statement was in fact made or that a conversation or discussion had in fact been held and no effort is made to use the statement or conversation as proof of the truth of the matter asserted, such evidence is not barred by the rule excluding hearsay evidence."

to the letter in dates and amounts—are also admissible on the same basis.[4]

Finally, assuming *arguendo* that the four exhibits were erroneously admitted, there is no showing of prejudice to petitioner. The material facts embodied in these documents were already in evidence through Seedman's testimony and the evidence of other witnesses, and thus the challenged exhibits were, as the court below found, "purely cumulative" (Pet. App. 11). Compare *Smith* v. *Bear*, 237 F. 2d 79, 89 (C.A. 2d).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] We submit that there is no doubt, as a practical matter, that Government's Exhibit 10 was a record kept in the usual course of the business of Rowe Service Company, Inc. It was not addressed to Seedman personally but to Seedman as president of that corporation (R. 145) and the invoice is headed "New Orleans Cigarette Service Corp." (R. 146). Both corporations are subsidiaries of the same parent company (R. 122–123) and, although Seedman initially objected to paying the amounts in question (R. 139–140), he did so when the parent company authorized payment (R. 149). Government's Exhibit 10, therefore, is the voucher retained by Rowe Service Company, Inc. as the basis for the payments made by it to Vaughn by means of the corporation's checks, Government Exhibits 11, 12 and 13. (See pp. 5–6, *supra*.)

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